Baker McKenzie.

CONSULTATION: CMA'S GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY

Baker McKenzie welcomes the opportunity to respond to the CMA's consultation on its proposed amendments to its Guidance As To the Appropriate Amount of a Penalty ("Draft Guidance"). Our comments are based on our experience of advising clients on UK and EU competition law.

As a general point, we agree that it is appropriate for the CMA to update its penalties guidance to reflect its practice since the publication of the current guidance, and the UK's withdrawal from the EU ("EU Exit"). We have a number of observations on some of the proposed changes, as set out below.

1. Step 1 - – clarification in the determination of relevant turnover

1.1 We note that, where the affected product or geographic market is wider than the relevant product market in the UK, the CMA intends to clarify that it may, in certain circumstances, take into account an undertaking's share of turnover in the wider affected product or geographic market(s) when determining the relevant turnover. We understand the rationale for this clarification, given that the CMA is now able to investigate large global cartels following EU Exit. The CMA will want to be able to impose a fine that is at such a level so as to deter anti-competitive conduct, but also encourage those who have been involved in cartels to apply for immunity/leniency in the UK.

1.2 However, we are concerned that taking account of turnover outside of the UK could result in excessively high and disproportionate fines in global cartel cases where an undertaking has minimal activity and turnover in the UK. This is exacerbated by the risk of parallel investigations, as the CMA is no longer prevented by Regulation 1/2003 from taking action to enforce UK competition law in relation to the UK aspects of a Europe-wide cartel being investigated by the European Commission. The risk of double jeopardy with respect to penalty calculation is considerable. We submit that any consideration of turnover achieved outside of the UK should be limited to the remit of the relevant regulators of the non-UK jurisdictions rather than the CMA, in order to protect undertakings against double jeopardy / double counting of competition fines in respect of the same conduct and the same (overseas) turnover.

1.3 Given that the CMA has the ability to uplift fines at Step 4 if the level of the UK fine is not considered deterrent enough, we consider that it is appropriate that the relevant turnover should be UK turnover in Step 1, and any adjustments can be made at Step 4.

2. Step 3 - changes to the adjustment for mitigating factors

Genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement and novelty of an infringement

2.1 We respectfully disagree with the CMA's proposal to remove the concept of genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement from the list of mitigating factors. Competition law is a complex area and not all infringements are clear-cut. Hard core infringements, such as price fixing and market sharing, amount to the most serious antitrust violations, and we agree that businesses ought to know that these are illegal. However, there are many arrangements and practices which could potentially infringe competition law but are less clear-cut. Examples could include certain terms in joint ventures; features in joint purchasing alliances; non-compete clauses. These arrangements may raise potential antitrust concerns, notwithstanding that they arise from

otherwise well-meaning and legitimate commercial co-operations, and someone who is not a competition law expert may genuinely not be aware of the risk of infringement. We are of the view that there is a material difference between this type of scenario and a very clear hard core infringement, and it is appropriate for the CMA to retain its discretion to consider genuine uncertainty as a potentially mitigating factor.

Adequate steps having been taken with a view to ensuring compliance

2.2 We disagree with the CMA's proposal that the existence of a compliance policy should not be viewed as a mitigating factor which may justify a lower penalty. We consider that the CMA's current approach is to be preferred, as this is more likely to incentivise undertakings to maintain an adequate and effective compliance programme . The proposed change is out of step with measures taken by other global regulators to credit compliance, such as Canada, where the regulator will recommend a fine reduction for a credible and effective compliance program in place at the time the offence occurred.[1] Another example is the US, which introduced a policy change in 2019 to direct antitrust prosecutors to consider "t*he adequacy and effectiveness of the corporation's compliance program*" during sentencing and when deciding whether and how to charge a company with a criminal antitrust violation.[2] For the CMA to now consider removing the possibility of a reduced penalty for having a compliance policy seems like a step backwards and risks discouraging businesses from engaging in compliance activities.[3]

2.3 In our experience, most companies want to conduct their businesses ethically and comply with the law.[4] The threat of fines, litigation and reputational damage create a strong incentive for businesses to create a genuine culture of compliance. Many companies spend significant resources in creating and maintaining sophisticated antitrust compliance programmes to encourage employees to understand their legal obligations, and the cost and effort of this should not be underestimated.

2.4 The consideration of genuine compliance efforts as a mitigating factor in setting a penalty creates a strong incentive for senior management in companies to take compliance seriously and to invest the time and money into creating appropriate measures. We agree with BIAC's statement at the recent OECD discussion[5] on competition compliance: "*Companies establish and maintain compliance programmes (for antitrust, but also in many other areas of law) to conduct business ethically and with integrity and to comply with the law. While competition lawyers might view compliance with competition as key, businesses in all sectors nowadays have to comply with a large set of rules in different areas of the law, each of them with their own compliance pressures and priorities. BIAC firmly believes that giving appropriate recognition to good efforts will encourage greater investment, more dedicated resources, and further efforts to enhance real compliance efforts in practice. Many in-house lawyers, the backbone of compliance efforts, argue from experience that taking into account a compliance programme for the purpose of a fine would allow them to show why the business should invest in the programme and resist budget limitations*."[6]

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[1] https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html
[2] https://www.justice.gov/criminal-fraud/page/file/937501/download
[3] See also Italian Competition Auth., Guidelines on Antitrust Compliance, available at guidelines_compliance.pdf (agcm.it) ; Comisión Nacional de los Mercados y la Competencia, CNMC Proposal For a Guide to Compliance Programs Concerning the Defense of Competition, available at 20200221 Compliance Guidelines_Draft_Public Consultation EN.pdf (cnmc.es);
[4] This is reflected in the CMA's recent research which found that the strongest factor for compliance with competition law is that it is the right thing to do ethically: *IFF Research, Competition Law Business Tracking Research. May 2021.*
[5] Competition compliance programmes - OECD
[6] Competition Compliance Programmes – Note by BIAC

2.5 We urge the CMA to reconsider its position and, rather than opting to remove adequate compliance steps as a mitigating factor, to consider some of the principles set out in the OECD discussion[7] such as:

- *"Requirements relating to internal detection and subsequent external reporting of competition offences*
- *A focus on management involvement in infringements*
- *The alignment of compliance and remuneration structures and incentives*
- *Effective and risk based internal auditing and monitoring of business processes, including the use of digital screening tools."*

2.6 In our experience of working with clients, and in particular supporting in-house lawyers in getting traction and budget with their senior management, the possibility of mitigating penalties if a company has an effective compliance policy and adequate compliance measures in place is an important and helpful driver in encouraging companies to invest in compliance and "do the right thing". In our view, based on our practical experience, it would be a backwards step for the CMA to remove adequate compliance steps as a mitigating factor.

3. Step 4– separate step for specific deterrence

3.1 We agree with the proposal to replace the current Step 4 with the first step to consider the need for any adjustment for specific deterrence (Step 4) and the second step to assess whether the overall penalty proposed is proportionate (Step 5).

3.2 We note that the Draft Guidance states that "*when assessing an undertaking's financial position for the purposes of deterrence, the CMA will generally take into account the undertaking's total worldwide turnover as the primary indicator of the size of the undertaking and its economic power, unless the circumstances of the case indicate that other metrics are more appropriate*." As noted above, given that the CMA has the ability to increase the level of penalty at Step 4, we do not consider that it is appropriate or proportionate for it to also have the ability to take account of turnover outside of the UK for the purpose of determining relevant turnover at Step 1.

4. Step 6 – penalty discounts for redress payments

4.1 We welcome the clarification that the CMA may also apply a penalty reduction where it considers that an undertaking has made appropriate redress for an infringement, including where this is not under an approved statutory voluntary redress scheme. This may provide an additional incentive to undertakings to engage in such redress where appropriate.

4.2 We disagree, however, with the CMA's approach of applying discounts at Step 6 on a consecutive basis (as set out in new paragraph 2.31 of the Draft Guidance). We submit that each of the leniency discount, the settlement discount and the reduction for a voluntary redress scheme should be applied to an undertaking's penalty figure as it stands after the new Step 5, rather than each successive reduction being applied to the already reduced figure. The latter approach fails to provide the undertaking with the full reduction it would otherwise be entitled to under the relevant regimes (if all other conditions are met), because each reduction percentage is applied to a lower figure. By way of an example, we refer to the European Commission's practice of adding the settlement reduction to the leniency reward such that

[7] OECD (2021), Competition Compliance Programmes, OECD Competition Committee Discussion Paper, https://www.oecd.org/daf/competition/competition-compliance-programmes.htm

undertakings can benefit from the full available reduction under each regime (i.e., leniency and settlement).

4.3 We welcome the proposed clarifications to the CMA's approach to financial hardship claims. In particular, we agree that it is appropriate for the CMA to take into account submissions about the specific social and economic context, as this may affect an undertaking's financial health in a way that may not be readily apparent from the undertaking's financials. We also welcome the inclusion of the possibility of "time to pay agreements", to reflect recent CMA practice.

5. Removal of Chapter 3 – Lenient treatment for undertakings coming forward with information in cartel activity cases

5.1 We agree that it makes sense to remove this chapter from the Draft Guidance, in order to avoid duplication with the CMA's separate leniency guidance.

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